SUPREME COURT, U. S.

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No. 301

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

LTV ELECTROSYSTEMS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LTV Electrosystems, Inc., the Petitioner herein, petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in the instant case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 388 F.2d 683. The Decision and Order of the National Labor Relations Board is reported at 166 NLRB No. 81.[1]

1. The opinions, orders and decisions entered by the Court below and by the Board are set forth in Appendix A, *infra*.

JURISDICTION

The opinion and judgment of the Court below were entered on January 18, 1968. A timely petition for order to have relevant portions of record filed and for rehearing or, in the alternative, for rehearing *en banc* was denied on April 18, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The jurisdiction of the Court below and of the Board rested on 29 U.S.C. §160.

QUESTIONS PRESENTED

I. Whether or not the National Labor Relations Board can refuse to apply its established rule against electioneering in the polling area during a representation election, when a refusal to do so is directly contrary to Board precedent?

II. Whether or not the National Labor Relations Board has the statutory authority to find that an employer committed an unfair labor practice and issue a remedial order against it, without affording the employer a hearing?

STATUTES INVOLVED

The relevant statutory provisions are §8(a)(1) and (5) and §10(b)(c) and (f) of the National Labor Relations Act, as amended [29 U.S.C. 151 *et seq.*]. These provisions are set forth in Appendix B, *infra*.

STATEMENT

The Petitioner is a Delaware corporation engaged in the repair, overhaul and modification of military aircraft at its Greenville, South Carolina, installation pursuant to

a contract with the United States Air Force (J.A. 234, 218-a).[2]

On December 19, 1966, a complaint was issued by the Board, alleging that on or about November 10, 1966, and at all times thereafter, the Petitioner refused to bargain collectively with United Automobile, Aerospace, Agricultural and Implement Workers of America, AFL-CIO, hereinafter called the Union, as the exclusive bargaining representative of employees in an appropriate bargaining unit in violation of §8(a)(5) and (1) of the Act (J.A. 230). The Petitioner duly filed its answer denying the commission of the unfair labor practices alleged. Thereafter, the Board filed a motion for summary judgment, contending that there was no need for a hearing and that the Board was entitled to judgment as a matter of law. On April 6, 1967, the Trial Examiner granted the motion for summary judgment, on the ground "[i]t is established Board policy . . . not to permit litigation in a complaint case of issues which were or could have been litigated in a prior related representation case" and that "[t]his policy is applicable even though no formal hearing on objections has been provided by the Board" (J.A. 232-33). On review, the Board affirmed the findings of the Trial Examiner on all substantive issues and, without any hearing having been held, issued an order finding that the Petitioner had violated §8(a)(5) and (1) of the Act.

The circumstances surrounding the Board's summary order in this case primarily center upon its action and rulings in the related representation case. These proceedings may be summarized as follows:

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2. A certified copy of the record in the Court below has been filed with this Court. Volume I of this certified record represents the Joint Appendix filed by the parties in the Court below. References to the Joint Appendix are designated by their appropriate page number, preceded by "J.A.".

On July 1, 1965, the Union filed a petition with the Board requesting that an election be held among all production and maintenance employees at the Petitioner's Greenville, South Carolina facility (J.A. 217). On November 29, 1965, the Board directed that the Regional Director conduct an election (J.A. 218-218-a). The election was held on December 10, 1965 (J.A. 218-h). On August 22, 1966, the ballots were counted. The Union received 210 votes out of 325 valid votes counted. One-hundred and fifteen votes were cast against the Union and 21 other challenged ballots were not resolved (J.A. 218-h).

On April 27, 1966, the Petitioner filed objections to the election and to conduct affecting the results of the election (J.A. 218-h). Thereafter, the Petitioner produced evidence to the Regional Director in support of these objections. However, no hearing was granted to the Petitioner on its objections (J.A. 220). On June 15, 1966, the Regional Director of the Board issued a Second Supplemental Decision and Certification of Representative, overruling the Petitioner's objections and certifying the Union as the exclusive bargaining representative of the employees (J.A. 218-h-227). Thereafter, the Board denied the Petitioner's request for review on the ground that it raised "no substantial issues warranting review."

By letter dated November 4, 1966, the Union requested that the Petitioner meet with it for the purpose of collective bargaining (J.A. 229). The Petitioner responded by letter dated November 10, 1966, acknowledging receipt of the request to bargain, but denying it on the ground that the certification of the Union was invalid and unlawful and that the campaign conducted by the Union, the rulings of the Regional Director and the Board, and the election of December 10, 1965, were improper and contrary to law (J.A. 229).

In the objections which the Petitioner filed to the election, it maintained that the election was invalid and should be set aside because electioneering occurred in the polling area during the election in violation of the Board's well established rule prohibiting such conduct (J.A. 218-h-219). During the investigation of the objections, the Petitioner submitted to the Board evidence showing that electioneering by former employee, Wayne England, was sufficient in itself to warrant setting aside the election. The Regional Director acknowledged in his Decision dated June 15, 1966 (J.A. 221) that ". . . the Employer has presented evidence that one of its former employees, Wayne England, engaged in electioneering at the polls." This evidence showed, and the Regional Director found, that England made the following statements to prospective voters while they were standing in line preparing to vote:

> —"you know which way to vote, you're going to vote yes . . .";
>
> "I'll bet you if the Union gets in, you'll get at least a dollar an hour raise . . .";
>
> —"you see what the company will do for you," referring to his own discharge;
>
> —"you know which way to vote—vote yes . . .";
>
> —"if you voted the union in we would get a substantial pay raise";
>
> "—you know how to vote";
>
> —"you better vote for the union"; and
>
> —". . . told them what benefits they would get by voting for the union" (J.A. 222).

During the investigation of the objections, the Regional Director obtained sworn statements from rank and file em-

ployees. One of these employees, L. H. Seel, stated that there were approximately "80 to 100 voters in the line" at the time this conduct was engaged in. All employees interviewed agreed that England walked up and down the line engaging in electioneering. The Regional Director pointed out that the election in question was conducted in an airplane hangar with the polling place located on one side and the entrance directly opposite. Because of the large number of voters, there was throughout the voting period a long line of persons waiting to vote which often extended entirely across the hangar and sometimes extended through the doors to the outside. The Regional Director found that for these reasons voters remained in line for substantial periods of time.

When employee I. K. Keenan came to the polls to vote, there was a long line which extended almost outside the hangar. Keenan testified that he heard England engaging in electioneering in the voting line. Furthermore, this witness said that another employee, Turner, was also engaging in electioneering on behalf of the Union at the polls. Keenan stated that both England and Turner were not standing in line, but were standing outside the line talking to employees. Keenan said when he left the hangar after voting, he thought England was still inside talking with prospective voters. Keenan recognized England and Turner as being "strong union men." After voting, this employee went back and told his supervisor that he did not think it was fair for someone to be expressing their opinions so near the polls.

The Regional Director found that England admitted making the remarks *"substantially as attributed to him"* (J.A. 222) (emphasis added). However, he overruled the Petitioner's objection on the ground that there was "no

evidence . . . to show that England was an agent of the [Union], acting in its behalf or at its request in making those remarks" (J.A. 222).

Subsequent to this Decision, the Petitioner filed a Motion for Reconsideration in which it called the Regional Director's attention to the fact that the Board's leading decision in *Claussen's Baking Co.*, 134 NLRB 111, clearly provided that it was not incumbent on the objecting party to prove an agency relationship in an objection based on electioneering at or near the polls.

In his Order dated August 9, denying the Motion for Reconsideration, the Regional Director stated as follows:

> "*With respect to its contention that England was an agent of the [Union], the Employer has submitted evidence tending to show that England was outspoken in support of the Petitioner and that on one or more occasions assisted representatives of the [Union] in distributing handbills. England admits having assisted in the distribution of handbills and having been at all times material an outspoken proponent of the [Union]*, but that his services were voluntary and not compensated. In the undersigned's views no proof of agency has been submitted and the undersigned adheres to the finding that England was not an agent of the [Union].
>
> * * *
>
> "Electioneering at or near a polling place is violative of Board policy but not all improper actions warrant setting an election aside. The test is whether or not, under all the circumstances, there was substantial interference with the orderly conduct of the election and the freedom of the voters to express a free choice.
>
> "The undersigned has reviewed his action in overruling this allegation in light of all the available Board precedents. Under the circumstances presented here, including but not limited to the improbability, based

on the election results, that England's conduct at the polls could have affected the outcome of the election, the undersigned finds the evidence concerning these allegations insufficient to raise substantial and material issues with respect to the conduct of the election. *Eastern Metal Products Corporation,* 116 NLRB 1382." See Appendix A, *infra* (Emphasis added).

The Court below approved the actions of the Regional Director of the Board, merely stating that the Petitioner's "exceptions to his report show no substantial and material issues of fact that could be resolved only in a hearing" (Transcript of Record, Volume III, p. 53).

THE REASONS FOR GRANTING A WRIT

I. The failure by the Board and the Court below to apply the Board's well established rule against electioneering during a representation election constitutes such a departure from the established and usual course of administrative proceedings as to call for an exercise of this Court's power of supervision.

An analysis of the decisions by the Board issued in this case reveals that it has, with Court approval, completely ignored its own decisions and rules governing electioneering at or near the polls during a representation election.

In *Peerless Plywood Co.,* 107 NLRB 427, the Board announced its rule against making speeches to employees within twenty-four hours of an election. In *Peerless Plywood* the Board asserted the twenty-four hour rule was *closely akin to and no more than an extension of the Board's rule prohibiting electioneering at or near the polling place.* The Board in explaining the new rule stated that "such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party,

whether employer or union, who in this manner obtains the last most telling-word."

In the case of *Claussen's Baking Co., supra,* the Board flatly rejected the agency requirement which the Board in the instant case found was an essential element of the Employer's case. In that case the Director concluded that although leadman Rakoske—a rank and file employee—was engaged in electioneering, it could not be attributed to the employer, and thus such conduct did not interfere with the conduct of the election. The Board in overruling the Director held:

> ". . . in the circumstances, *without assessing culpability therefor,* we are of the opinion that the electioneering here engaged in by Rakoske was of such a nature that it inhibited the exercise of free choice and therefore constitutes a basis for setting aside the election. Accordingly, we shall set aside the election and order that a new one be conducted." (Emphasis added).

In the *Twenty-Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ending June 30, 1962,* the Board stated:

> "An election will be set aside if it was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals and thus interfered with employees' free and untrammeled choice of a representative guaranteed by the Act.[64]"

Footnote 64 states:

> "In order to prevent confusion and turmoil at the time of the election, the Board has specifically prohibited electioneering speeches on company time during the twenty-four hour period just before the election (citing *Peerless Plywood Co.,* 107 NLRB 427 (1953)), as well as electioneering near the polling place during the election (citing *Claussen's Baking Co.,* 134 NLRB 111)."

None of the subsequent Annual Reports have changed this rule. *Claussen's Baking Co.* has never been overruled.

The Board in *Milchem Inc.*, 170 NLRB No. 46 (1968), announced a "blanket" prohibition against conversations in the polling area. The Board made it clear it would void an election at any time there was conversation in the polling area by representatives of any of the parties to the election without an examination being made of the "substance" and "effect" of the conversation.

In *Starr Expansion Industries Corp.*, 170 NLRB No. 47, the Board set aside an election won by the IBEW, which was one of two unions involved in the election, because of a violation of the Board's electioneering rule by one Singleton who was "acting on behalf of the IBEW." The Director found that Singleton had served as a member of the IBEW organizing committee, distributed literature on behalf of the IBEW and on occasions wore a union button. The Board stated (footnote 8) "without resolving the conflicting evidence as to whether or not Singleton was in fact a business agent of the IBEW, we find, on the basis of the undisputed facts as set forth above, *that he was an agent of the IBEW for the limited purposes of distributing campaign literature and electioneering on its behalf.*" (Emphasis added).

In the present case, the Regional Director asserted as one of his reasons for refusing to set aside the election the fact that England was not an "agent" of the Union. His refusal to hold that England was an agent was based on the fact that England was not compensated for his services. However, the Regional Director in his order found as follows:

> "England admits having assisted in the *distribution of handbills* and having been at all times material *an outspoken proponent of the Petitioner [Union]*. . ." (Emphasis added).

Thus assuming some type of agency relationship is necessary, the *Starr Expansion* case, *supra,* clearly demonstrates that England's activity was sufficient to make him a "limited" agent of the Union for the purpose of engaging in electioneering.

In dealing with the electioneering issue, the Regional Director, in his Order Denying Motion for Reconsideration, raised as a second barrier to this objection the subjective standards test. It was, according to the Regional Director, improbable that England's conduct at the polls could have affected the outcome of the election—there was not "substantial" interference with the election. See Appendix A, *infra.*

In *Peerless Plywood Co., supra,* the Board held that the twenty-four hour rule was "closely akin to" and an "extension of" the Board's rule prohibiting electioneering at the polls. The Board in *Great Atlantic and Pacific Tea Company,* 111 NLRB No. 106 (1955), stated as follows:

> "Violation of the *Peerless Plywood* rule, *as in the case of improper electioneering,* constitutes grounds for setting aside an election, entirely apart from the considerations which accompany findings of specific interference with an election. It is sufficient that *Peerless Plywood* speeches tend to prevent a free election; the actual effect upon the voters in any case—even if it could be measured—is not material. *Nor is it necessary that such conduct affect enough employees to change the election results.*" (Emphasis added.)

From the foregoing, it is evident that the Board in other cases applied an objective standards test rather than a subjective standards test in electioneering cases. In *Kilgore Manufacturing Company,* 45 NLRB 468 (1942), the Board in striking down the union's arguments that there must be shown such actual restraint or interference as

would influence the results of the election (the union had won by a vote of 286 to 221) held:

> "To require, in each case, a nice measurement of the actual coercive or intimidatory effect of misconduct on the results of the election, would place an undue burden on the objecting party and the Board. It is sufficient that, as in the instant case, the evidence reveals a willful violation of a material and salutary election rule."

To hold that an objecting party must show that such conduct affected enough employees to change the results of the election would be an open invitation to both unions and employers to engage in more poignant illegal conduct in order to obtain the largest possible margin of victory and thus lessen the chances of the election being voided.[3]

In the present case, the conduct of England and Turner amounted to nothing less than mass electioneering in the polling area. England's conduct was so outrageous and flagrant that an employee coming into the voting area could well conclude that England was running the election and not the National Labor Relations Board. The effect on prospective voters occurring as it did just a few minutes prior to the casting of their ballots is obvious.

II. The Board's refusal to grant the Petitioner a hearing is in conflict with the decisions of other Courts of Appeals and raises an important question of federal law which has not, and should be, settled by this Court.

The Board has used the device of a motion for summary judgment to convict this Petitioner, without affording it a right to a hearing. The use of such a procedural

3. Be that as it may, employee Seel stated there were approximately "80 to 100 voters" in the line at the time England was engaged in electioneering. The results of the election in the present case was 210 to 115. Forty-eight votes would have changed the results of this election.

weapon represents an injustice of the rankest sort. In the first place, the labor statute demands that in an unfair labor practice case the Board's complaint must contain "a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed" and that the accused must be granted "the right . . . to appear in person or otherwise and give testimony at the place and time fixed in the complaint." 29 U.S.C. §160 (b). The statute goes on to say that it is only "upon the preponderance of the testimony taken," that the Board is authorized to find an unfair labor practice. 29 U.S.C. §160 (c).

Three United States Courts of Appeals have passed upon the validity of the Board's summary judgment practice. The Sixth Circuit has concluded that the Board's summary judgment practice is invalid. See *NLRB* v. *K. V. P. Sutherland Paper Co.*, 356 F.2d 671 (6th Cir. 1966). The Fifth and Third Circuits have approved the Board's practice. See *Neuhoff Brothers, Packers, Inc.* v. *NLRB*, 362 F.2d 611 (5th Cir. 1966); *NLRB* v. *Puritan Sportswear Corp.*, 385 F.2d 142 (3rd Cir. 1967)

Because the Board's summary judgment practice raises an important question of federal law which has been answered differently by the Courts of Appeals, the question should be settled by this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Second Supplemental Decision and Certification of Representative

Pursuant to a Supplemental Decision and Direction of Election issued by the Regional Director of the Eleventh Region on October 26, 1965, an election by secret ballot was conducted on December 10, 1965, among the employees in the unit therein found appropriate[1] with the following results:

Approximate number of eligible voters	350
Void ballots	0
Votes cast for Petitioner	210
Votes cast against participating labor organization	115
Valid votes counted	325
Challenged ballots	21
Valid votes counted plus challenged ballots	346

On April 22, 1966, copies of the Tally of Ballots were duly served on authorized representatives of the parties.[2]

On April 29, 1966, the Employer filed timely objections to the conduct of the election and to conduct affecting the results of the election. A copy of said objections was duly served on Petitioner.

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1. The unit is: "All production and maintenance employees, including leadmen, aircraft checkers, inventory audit clerks, timekeepers and firemen employed at the Employer's Greenville, South Carolina, operations excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

2. After the December 10, 1965, election, by order of the Board, the ballots were impounded. On April 15, the Board directed that the ballots be opened and tallied.

The text of the Employer's objections is as follows:

"1. Employer objects to the election on the ground that the unit within which the election was held was, and is, inappropriate for the purposes of collective bargaining; and that the determination of such unit as appropriate by the Regional Director for the Eleventh Region, and as affirmed by the National Labor Relations Board, was arbitrary, capricious, illegal, and contrary to the National Labor Relations Act, and an abuse of statutory authority. Such unit determination created an atmosphere of coercion, intimidation and confusion preventing the voters from exercising their free and untrammeled votes.

"2. Employer objects to the election on the ground that the eligibility rulings by the Regional Director in his Supplemental Decision and Direction of Election and by the subsequent rulings of the Regional Director and National Labor Relations Board unlawfully disenfranchised approximately one-hundred twenty eligible voters. Said Decisions are arbitrary, capricious, illegal and contrary to the Act and an abuse of statutory authority. These eligibility restrictions created such an atmosphere of coercion, intimidation and confusion preventing the exercise of free and untrammeled views by the voters.

"3. Employer objects to the election on the ground that since on or about July 1, 1965, and continuing through the day of the election, December 10, 1965, and prior thereto, 'supervisors' within the meaning of Section 2(11) of the Act, acting as agents of and/or on behalf of the Petitioner have so coerced, intimidated and interfered with the employee's rights guaranteed under the Act, as to completely make impossible a free and untrammeled election and obliterate the laboratory conditions required by the National Labor Relations Board for representation elections.

"4. Employer objects to the election on the ground that the Petitioner by and through its organizers and

agents and/or persons acting on its behalf have engaged in illegal and unlawful conduct in violation of the National Labor Relations Act.

"5. By these and other acts, the Petitioner by and through its agents and/or organizers and/or those persons acting on its behalf have engaged in illegal and unlawful conduct which interfered with employee's rights to freely choose a collective bargaining representative in violation of the National Labor Relations Act."

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the issues raised by said objections has been made under the supervision of the undersigned who, having afforded the parties full opportunity to submit and present evidence bearing on the issues and having carefully considered the results of the investigation, reports as follows:[3]

OBJECTIONS 1 and 3:

The basis of the Employer's Objections 1 and 3 is the contention that the leadmen employed by the Employer are supervisors within the meaning of Section 2(11) of the Act; hence, their activities on behalf of the Petitioner are illegal.

On the basis of record testimony, the undersigned, in the aforementioned Supplemental Decision and Direction of Election, found leadmen not to be supervisors and included them in the bargaining unit. The Board, granting the Employer's Request for Review, found after a reopened hearing during which additional testimony was presented

3. Only incidents which occurred between July 1, 1965, the date of the filing of the petition, and December 10, 1965, the date of the election, are herein considered material. See *Ideal Electric & Manufacturing Co.*, 134 NLRB 1275.

by both parties that the leadmen employed by the Employer were not supervisors as defined in Section 2(11) of the Act.

Objections 1 and 3, therefore, raise no material and substantial issues warranting the setting aside of the election and are overruled.[4]

OBJECTION 2:

In support of Objection 2, the Employer contends that 128 employees were not permitted to vote in the election because they were not employed on October 24, 1965.

The Supplemental Decision and Direction of Election issued on October 26, 1965. The election directed that date was conducted among employees who were employed by the Employer during the payroll period immediately preceding the date of the issuance of the Direction of Election, in accordance with the Board's regular procedure in fixing a cutoff date which applies to all parties alike.

The Employer, in Motions for Reconsideration and its Request for Review before the Board made a similar request which was, in due course, denied by the undersigned and the Board.

Objection 2, therefore, is overruled as it raises no material or substantial issues.

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4. By its letter dated May 31, 1966, the Employer requested that a hearing be ordered to receive further evidence to Objections 1, 2 and 3. The request will be treated as a motion. This motion, in substance, was made before the undersigned on November 10, and denied on November 15, 1965. On December 1, the Employer moved the Board reconsider the denial. It was denied on December 8, as lacking in merit. The Employer's present request fails to state what new evidence it would offer at a hearing, if ordered, and fails to state what, if any, newly discovered evidence was not available to it in the hearings previously held. The motion is denied.

OBJECTIONS 4 and 5:

The Electioneering at the Poll:

In support of Objection 4, the Employer has presented evidence that one of its former employees, Wayne England, engaged in electioneering at the poll.

The investigation disclosed that England was discharged on November 15, 1965. During the period of his employment, he occupied the positions of leadman and foreman. No evidence has been presented that England, during the time he acted as a foreman and thus a supervisor within the meaning of Section 2(11) of the Act, engaged in any conduct on behalf of the Petitioner in organizing the Employer. On December 10, the day the election was held, charges filed by the Petitioner in England's behalf alleging his discharge to be illegal, were pending. Thus, England was permitted to vote a challenged ballot as he presented himself at the poll.

Witnesses presented by the Employer state that England made the following remarks: "You know which way to vote, you're going to vote yes. . . ." "I'll bet you if the Union gets in, you'll get at least a dollar an hour raise. . . ." "You see what the Company will do for you now." (referring to his own discharge). "You know which way to vote—vote yes, . . ." "If we voted the Union in we would get a substantial pay raise." "You know how to vote." "You had better vote for the Union," and ". . . told them what benefits they would get by voting for the Union."

One witness's reaction was, "I said yeah, sure and kinda passed it off." Another reply was a scatological expletive expression of disbelief.

England admits making the remarks substantially as attributed to him. The witnesses also state that an em-

ployee named Turner accompanied England and agreed with one of England's remarks. Another witness states an employee, Wendall Chavis, accompanied England. No such incident was reported to the Board Agents conducting the election.

As no evidence has been presented to show that England was an agent of the Petitioner, acting in its behalf or at its request in making those remarks, his remarks constitute no more than typical conversation between voters in line expressing their own feelings as to the issue at hand. This portion of Objection 4, therefore, is overruled as it raises no substantial or material issues.

The Union's Literature:

Supporting its position to this portion of the above objections, the Employer has submitted certain propaganda leaflets issued by the Petitioner.[5] The Employer, by its letter dated May 31, 1966, argues:

> "It is the position of this company that the underlying and constantly repeated theme of the handbills is one creating the intended impression that the company is a law breaker, a scalawag and a ruthless company which would walk rough shod over the rights of the employees. In this illegal campaign (as painted by the union's handbills) the company is using high paid and expensive professional crooks as their attorneys. The handbills refer to the company's attorneys as high paid, mad dog shysters who have been employed to delay, thwart and prevent the employees from exercising their rights in the selection of a collective bargaining representative. The fact that these remarks may be libelous per se is not the important point as it relates to the subject matter of your investigation. The importance of these libelous attacks at this point is that such remarks created an atmosphere of fear and

5. Attached hereto as Appendixes A through I.

distrust in the minds of the voters. Their rights were interfered with. The union exceeded the permissible 'sales approach' by painting the company as a willful and intentional law breaker with high paid professional crooks at the helm of the company's illegal campaign. Certainly, such literature violates the 'laboratory atmosphere' that the Board finds desirable in election situations.

"How can an employee cast free and untrammelled votes for or against a collective bargaining representative when his employer has been repeatedly branded a willful law violator whose movements are being controlled by high paid crooks. The company believes that these handbills of the union were coupled with verbal comments and other material misrepresentations which require that a Hearing be granted on the issues presented by the Objections."

The undersigned has carefully reviewed the complained of literature and finds the utterances of the Petitioner do not exceed the permissible bounds of propaganda and can be best judged by the electorate for what it is, campaign propaganda. The undersigned, therefore, concludes that there is no merit to this portion of the objections.[6]

The Cobra Club Incident:

In support of this objection, the Employer has presented evidence that on or about November 12, 1965, between 10 and 20 of its employees, one of its supervisors, Kenneth L. Callahan, a foreman, and three Union Organizers were present when an altercation took place at a tavern called "Cobra Club," between 8 and 9 p.m.

The Employer's witnesses agree they arrived at the club at about 4:30 p.m., and sat at two tables pushed to-

6. The Employer's request for a hearing is denied, as the literature, printed matter, is not in conflict, and speaks for itself.

gether with Callahan, their supervisor. Two employees state Union Organizer Jenkins came to the table and tried to get Callahan to discuss the union campaign with him (One witness states it was Union Organizer Jackson). All agree Callahan declined to talk about the union campaign as it was not the proper place. The witnesses state Union Organizer Ira A. "Stretch" McCoy came from the bar, stood behind Callahan and patted him behind the ear.

Here the Employer's witnesses vary. One states Callahan announced he was going home; McCoy struck him in the head; Callahan walked towards the door; an employee, Calvert, attempted to arise, removing his coat, was struck by McCoy; knocked on the table and grabbed by McCoy. The witness wrestled McCoy to the floor and held him there. The witness states: "That was the end of the fighting. The Union Organizer offered to buy beer. Calvert and I had another beer and Callahan went home . . . Jenkins tried to restrain Stretch."

Calvert states he saw McCoy tap Callahan's ear. He continues: "I said something to the effect that I'd go outside with him, stood up. Stretch had moved toward the door. As I was in the process of taking my jacket off Stretch hit me in the jaw. I stumbled against the table and had my jacket off (when) the bartender, Jim Floyd, came over and I hit him, mistakenly, behind the ear." Calvert continues: "The bartender had a stick. I hit Stretch above the eye cutting him, we rolled around the table and an employee named McNew pulled Stretch off." Calvert states they all calmed down, everyone calmed down, apologized, shook hands. He received a compliment for his pugilistic ability from McCoy and the organizers stayed at the table talking to the employees.

Callahan states McCoy tapped, banged or hit him behind the ear, not hard enough to hurt but hard enough

to provoke him into a fight. Callahan states Calvert hit McCoy and then started to remove his coat. McCoy returned Calvert's blow knocking him across the table. McNew "straddled" McCoy under the table. Callahan arose, told Union Organizers Jackson and Jenkins to stop it before someone got hurt. The bartender, wielding a three foot club, said to break it up. As Callahan left, there was some apologizing and shaking of hands.

Two participants state the incident was talked about through the plant for several days following the incident.

McCoy admits striking Calvert because Calvert jumped up as if to attack when McCoy objected to names he was allegedly called. McCoy agrees it broke up quickly, the bartender assisting with a cue stick. Some people tried to quell the incident. It took less than a minute and he later chatted with employees, engaging in tavern talk. Jackson and Jenkins deny they sat at the table or that they said anything to Callahan or saw any blows exchanged, but agree the incident took not over two minutes and were assured by employees present to think nothing of the incident.

A Synthesis of all the accounts makes it clear that there was an altercation, in which one or two blows were struck, with three individuals as principal participants and others as minor participants or spectators. There is general agreement that the incident lasted no more than a few minutes. At its conclusion one participant, Callahan, left the club. Other participants and witnesses, including the union representatives, remained. There was a calming down, with apologies and handshakes exchanged. Another round of drinks and some conversation followed. There was no further demonstration of hostility or ill will, that evening or thereafter.

It is apparent—whichever versions are accepted—that the incident at the club, and its effects, were transitory and insubstantial in nature. The incident occurred away from the plant, after hours, and approximately a month before the election. Immediately after the flare-up, the participants and witnesses manifested their lack of ill will by exchange of apologies, handshakes and another round of drinks.

The undersigned is of the opinion that the incident—remote from the place and time of the election, witnessed by a few employees, and insubstantial and fleeting in its effects—was not of a nature that the Board has said is "not conducive to the kind of free and unintimidated choice of representatives which the Act contemplates".[7] The undersigned finds that Objections 4 and 5 do not raise substantial or material issues with respect to the conduct of the election and they are hereby overruled.

CONCLUSIONS

As the Employer's objections have been overruled and as the Petitioner has received a majority of the valid ballots cast in the election of December 10, 1965, the undersigned will issue a Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, has been designated and selected by a majority of the employees in the appropriate unit as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all

7. cf. *New York Shipping Association*, 108 NLRB 135, 142.

the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

Dated at Winston-Salem, North Carolina this 15th day of June 1966.

/s/ Reed Johnston
Reed Johnston, Regional Director
National Labor Relations Board
Region 11
1831 Nissen Building
Winston-Salem, North Carolina 27101

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ELEVENTH REGION

LTV ELECTROSYSTEMS, INC., Employer and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Petitioner	Case No. 11-RC-2223

Order Denying Motion for Reconsideration

On June 15, 1966, the undersigned issued a Second Supplemental Decision and Certification of Representatives in which he overruled the Employer's objections and certified the Petitioner as the representative of the employees in the unit found to be appropriate. Subsequently, on July 5, 1966, the Employer filed a Motion for Reconsideration

with the undersigned. On July 11, the Employer filed a Request for Review with the Board in Washington, D. C.[1]

In substance, the Employer asks that the findings and conclusions relating to objections 4 and 5 be reconsidered. Additionally, the Employer asks consideration of certain evidence alleged to be newly discovered tending to show that an altercation between employees W. R. Dean and Paul M. Vaughn during October 1965 created an atmosphere of fear among the employees preventing the employees from making a free and untrammeled choice in the election.

With regard to the Dean-Vaughn incident, the Employer submitted an affidavit from Dean, dated June 21, 1966, which states in pertinent part, "Vaughn was constantly promoting the union to me during working and non-working time. After it became known that I was against the union, Vaughn and some of the other employees tried to give me the impression that I was a turncoat. I guess this was because I had gone to the first two union meetings. Vaughn and some of the other employees continued to call me names, both during work time and non-work time. They kept calling me 'turncoat' and other names. Vaughn would say this just about every time he saw me or would make some similar statement." "During the middle or latter part of October, 1965, I became concerned about these statements and told Vaughn to stop calling me these names that I was not going to take any more of it. Vaughn then reached inside his pocket and pulled out a pocket knife—I am almost sure he opened the knife—and told me to step outside and he would work me over

1. In its Request for Review, the Employer requests, in pertinent part, that in the event the undersigned acts favorably, in whole or in part, on the Motion for Reconsideration that the Board grant it permission to modify the Request for Review.

right then' or 'fix me up right then."[2] Prior to Vaughn's pulling out the knife, we had been sitting in the break area. Vaughn was sitting at another table from where I (was) sitting and was calling me 'turncoat' and other names. After the break was over and we started back to the work area, Vaughn again called me 'turncoat' or possibly 'traitor' and that was when I told him I was not going to take it any more. This was when he pulled the knife on me. After Vaughn pulled the knife on me, I told him I had a family to support and so did he and I was not going to fight him."

Vaughn states that Dean had worked for the Employer previously and was terminated during September 1965. He was subsequently rehired. Whereas Dean was prounion before his termination, he was very much antiunion after he was rehired. He talked against the Union to anyone who would listen to him. On the day of the incident Vaughn recalls that Dean came through his department. Vaughn turned to another employee and said loud enough for Dean to hear, "There goes a turncoat." Dean turned around and told Vaughn that he had heard enough of "this turncoat stuff" and if it continued he would meet him outside the gate. Dean continued to talk. Vaughn finally told him that they did not have to go outside, that they could settle the matter right there and then. Dean walked off muttering. Later that afternoon, Dean's foreman, R. A. Martin, came by and told Vaughn that they should not fuss with one another. Vaughn specifically denies that he took a knife out of his pocket or that he threatened Dean with one.

Three witnesses who were in the immediate vicinity and observed the incident state that when Dean came

2. Dean's affidavit makes no reference to "cut him up" as stated in quotes in the Employer's motion.

through the area Vaughn said something about a "turncoat." Dean resented the remark and offered to settle the matter "outside." Vaughn replied that there was no need to go outside, that they could settle it right then and there. Dean then walked off. All the witnesses state that Vaughn did not take a knife or any other object out of his pocket.

According to Dean's foreman, R. A. Martin,[3] sometime during October 1965, Dean reported to him that Vaughn had called him names and when he asked Vaughn to stop Vaughn threatened him. Martin went to see Vaughn to see if he could patch up their quarrel. Dean suggested that the two shake hands and make up. Vaughn, obviously angry, refused to do so. Martin cautioned Vaughn that he did not want any trouble between the two while they were on the premises. Martin also states that he heard something about a knife in connection with the incident but he cannot recall the source of his information.

The undersigned notes that the Employer submitted an affidavit from Dean, dated June 6, 1966, in connection with these objections. In his June 6 affidavit, Dean makes no mention of this incident. When an agent of the undersigned sought to take a further affidavit from Dean to learn further details of the alleged knife incident, Dean refused to be sworn.

Assuming, without deciding, that the incident occurred as related in Dean's June 21 affidavit, we have, at most an altercation between a pro and an antiunion employee. No evidence was presented, nor is it contended, that Vaughn is a Petitioner agent or authorized to act on its be-

3. Martin's affidavit, dated July 12, 1966, was submitted by the Employer. An agent of the undersigned interviewed Martin previously but on instructions from the Employer's attorney he refused to give the agent a written statement.

half. The undersigned finds that the Dean-Vaughn incident raises no material or substantial issues.[4]

As for the Cobra Club incident, the undersigned has considered the matters raised and supporting arguments presented in the Motion for Reconsideration and is of the opinion that no substantial issues are raised and adheres to the findings and conclusions made in the Second Supplemental Decision and Certification of Representatives.

In its Motion for Reconsideration, the Employer contends for the first time that leadman Ira K. Keenan, Jr. was threatened with physical harm because of his "refusal to go along with the Union." In his affidavits Keenan states that he was harassed and threatened by various employees because of the manner and speed in which he did his work and his nervous condition.[5] No evidence was presented or otherwise adduced during the investigation to show that any of the employees who allegedly harassed or threatened Keenan were agents of the Petitioner. Furthermore, it appears that the thrust of the harassment had to do with the speed in which Keenan completed his work. The undersigned, therefore, finds this contention to be without merit.

With respect to its contention that England was an agent of the Petitioner, the Employer has submitted evidence tending to show that England was outspoken in his support of the Petitioner and that on one or more occasions assisted representatives of the Petitioner in distributing handbills. England admits having assisted in the dis-

4. *NLRB* v. *Myca Products Division of the Kane Co.*, 352 F.2d 511 (CA 6), enforcing 145 NLRB 1068.

5. Keenan received a medical discharge from the Air Force, a fact which became known to many of the employees. The nature of the discharge was used by several employees to ridicule Keenan.

tribution of handbills and having been at all times material an outspoken proponent of the Petitioner, but that his services were voluntary and not compensated. In the undersigned's views no proof of agency has been submitted and the undersigned adheres to the finding that England was not an agent of the Petitioner.

With respect to the alleged electioneering near the polling place: This election was conducted in an airplane hangar with the polling place located on one side and the entrance directly opposite. Because of the large number of voters and the presence of very many persons ineligible because they had been hired after the payroll date, but who appeared asserting the right to vote, there was throughout the voting period a long line of persons waiting to vote which often extended entirely across the hangar and sometimes extended through the doors to the outside. For these reasons voters remained in line for substantial periods of time.

Evidence has been submitted by witnesses for the Employer tending to show that England engaged in conversations in the line, voicing his prounion sentiments and that others replied with remarks expressive of their antiunion sentiments. Evidence has also been presented by witnesses for the Employer that England loitered and changed places in the line and that he engaged in further remarks while leaving the hangar in which the polls were located after voting. England admits having made prounion remarks substantially as alleged to which in some cases he received antiunion replies as stated by Employer witnesses. His estimate of the number of persons spoken to is substantially lower than the estimate of one Employer witness but only slightly lower than the estimates of other Employer witnesses. He denies loitering, but admits talking to some

persons as he was leaving. He states, in agreement with Employer witnesses, that he was in the hangar for a substantial period of time, but explains that when he appeared to vote the voting line extended across the hangar and for a substantial distance outside. No actions by England or others were brought to the attention of the Board Agent in charge at any time.

Electioneering at or near a polling place is violative of Board policy, but not all improper actions warrant setting an election aside. The test is whether or not, under all the circumstances, there was substantial interference with the orderly conduct of the election and the freedom of the voters to express a free choice.

The undersigned has reviewed his action in overruling this allegation in the light of all the applicable Board precedents. Under the circumstances presented here, including but not limited to the improbability, based on the election results, that England's conduct at the polls could have affected the outcome of the election, the undersigned finds the evidence concerning these allegations insufficient to raise substantial and material issues with respect to the conduct of the election. *Eastern Metal Products Corporation,* 116 NLRB 1382.

CONCLUSIONS

The undersigned has considered the matters raised and supporting arguments presented in the Motion for Reconsideration and is of the opinion that no substantial issues of fact, law or policy are raised and adheres to the findings and conclusions made in the Second Supplemental Decision and Certification of Representatives, dated June 15, 1966.

Accordingly, the Employer's Motion for Reconsideration is hereby denied.

Dated at Winston-Salem, North Carolina this 9th day of August 1966.

/s/ Reed Johnston
Reed Johnston, Regional Director
National Labor Relations Board
Region 11
1624 Wachovia Building
Winston-Salem, North Carolina 27101

Trial Examiner's Decision

Statement of the Case

The Representation Proceeding

CHARLES W. SCHNEIDER, *Trial Examiner*: On October 26, 1965, the Regional Director for the Eleventh Region of the National Labor Relations Board, herein called the Board, after hearing, issued a Supplemental Decision and Direction of Election in Case No. 11-RC-2223, in which he found the union described *infra* appropriate for the purposes of collective bargaining. The Respondent Employer, LTV Electrosystems, Inc., Greenville, North Carolina, on November 4, 1966, moved that the Regional Director reconsider his Supplemental Decision and Direction of Election and reopen the record in the representation hearing for the purpose of admitting additional evidence on the status of leadmen, whom the Respondent contended were supervisors within the meaning of the National Labor Relations Act. On November 8, 1965, the Respondent's Motion for Reconsideration was denied by the Regional Director, whereupon, the Respondent filed a Request for Review with the Board. Upon review, the Board remanded the case to

the Regional Director to receive further evidence pertaining to the status of leadmen.

By subsequent order of the Board dated November 29, 1966, a secret ballot election was conducted on December 10, 1965, in accordance with the Regional Director's Supplemental Decision and Direction of Election of October 26, 1965, but with instructions to the Regional Director to challenge the ballots cast by leadmen and to impound all ballots cast in the election. The votes of leadmen were challenged by the Respondent and at the conclusion of the election the ballots were impounded pending a final determination of the leadman issue. On December 15, 16, 17, 27, 28 and 29, 1965 a hearing was held pursuant to the Board's order of November 29, 1966, at which further record evidence was taken concerning the supervisory status of leadman. The Regional Director then transferred the representation case to the Board for disposition.

On April 15, 1966, the Board issued its decision finding that leadmen were not supervisors within the meaning of the Act and ordering that the ballots be opened and counted. The ballots were opened and counted on April 22, 1966, and the tally showed that out of 325 valid votes counted 210 votes were cast for the Union and 115 votes were cast against the Union. There were 21 remaining challenged ballots.

The Respondent having filed timely objections to the election, the Regional Director on June 15, 1966, after investigation, (and after having afforded the parties opportunity to submit evidence bearing on the issues, but without formal hearing) issued a Second Supplemental Decision and Certification of Representative in which he overruled the Respondent's objections and certified the Union as the exclusive collective bargaining representative of the employees in the appropriate unit.

Thereafter the Respondent filed a Motion for Reconsideration of its Objections, which the Regional Director denied. Respondent also filed a Request for Review with the Board in which Respondent sought a reversal of the Regional Director's rulings in the Second Supplemental Decision and Certification of Representative and further requested that the Board set aside the election. Respondent's request for review was denied by the Board on October 26, 1966, on the ground that it raised "no substantial issues warranting review."

The Unfair Labor Practice Proceeding

Under date of November 4, 1966, the Union, by letter, requested that the Respondent meet with it for the purpose of collective bargaining. By letter dated November 10, 1966, Respondent acknowledged receipt of the request to bargain but denied the request on the ground that the certification of the Union was invalid and unlawful and that the campaign conducted by the Union, the rulings of the Regional Director and the Board, and the election of December 10, 1965, were all improper and contrary to law. Thereafter, on November 23, 1966, the Union filed a charge with the Board alleging that the Respondent had refused to bargain collectively. Upon this charge the Regional Director issued a complaint dated December 19, 1966, alleging that on or about November 10, 1966, and at all times thereafter, Respondent refused and continues to refuse to bargain collectively with the Union as the exclusive collective bargaining representative of employees in the appropriate unit, in violation of Section 8(a)(1) and (5) of the Act.

The Respondent duly filed its answer denying the commission of the unfair labor practices on the ground that the Union does not represent an uncoerced majority of the

unit employees. The Respondent, in its answer, admits the Complaint allegations as to the fact of the election and the certification of the Union and further admits that, following the certification, the Union requested the Respondent to meet with it for the purposes of collective bargaining negotiations, and that the Respondent refused this request. The answer specifically asserts, in defense of the refusal to bargain charge, that the Regional Director wrongfully overruled and denied the Respondent's objections to the election—which would, if valid, require that the election be set aside.

Under date of January 9, 1967, counsel for the General Counsel filed a Motion for Summary Judgment, subsequently amended, in which the General Counsel contended that there is no factual matter in dispute between the parties which would require testimony to be taken at a hearing and that upon the pleadings and attached exhibits the General Counsel was entitled to judgment as a matter of law. Upon this motion I issued an order directing the parties to show cause why summary judgment should not be granted, to which all interested parties filed briefs and memoranda in support of their respective contentions. On March 7, 1967, I issued a telegraphic order granting the General Counsel's Motion for Summary Judgment and stating that a Trial Examiner's Decision would be issued at a later date. Various procedural rulings are noted below.[1]

1. The Respondent has requested oral argument before the Trial Examiner. This request is denied inasmuch as the record is adequate to dispose of the issues litigable before me.

The Respondent filed a response to the Charging Party's response to the motion for summary judgment. The Respondent's request for permission to file a brief in support of its response is denied.

On February 10, 1967, the Respondent filed a Motion to Take Administrative Notice, later corrected. Upon that motion I entered an order taking administrative notice of the record and formal documents in the representation proceeding, Case No. 11-RC-2223. Administrative notice was also taken of the record

Decision as to Summary Judgment

The Respondent's brief is devoted substantially to argument upon the merit of its assertions in the representation case, namely, that the Union is not a legal representative, and that in any event the Respondent was improperly deprived of hearing upon its objections. The Respondent requests that the Trial Examiner sustain its objections and set aside the election. It further asks that the Union's petition be dismissed, or in the alternative that the Trial Examiner order a hearing on the Respondent's objections to the election. In addition the Respondent raises various other procedural objections to the motion for summary judgment: That there is no provision in the Board's rules for a summary judgment procedure; that the Trial Examiner is without jurisdiction and lacks authority in law to grant such a judgment; that a hearing in an unfair labor practice case is mandatory and a matter of right; and that the Respondent has additional evidence requiring a hearing. I find none of these objections to judgment sustained.

It has been seen that the Union was certified by the Regional Director as the lawful bargaining representa-

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and formal documents in Cases Nos. 11-CA-2948, 11-CA-3045, 11-CA-3100, and 11-CA-3104, to the extent requested by the Respondent, insofar as they bear on the issue of the status of leadmen.

On March 1, 1967, the Respondent filed a Supplemental Motion to Take Administrative Notice. It appearing from that motion that the documents referred to therein were before the Regional Director in his consideration of the representation proceeding, the motion is granted. As to such of the documents as are in the exclusive possession of the Regional Director, the Director is requested to forward true copies to the Board in Washington for inclusion in the official file of the representation proceeding.

Administrative notice is taken of these various matters, not for the purpose of permitting the Trial Examiner to re-examine the previous dispositions of the Regional Director and the Board, but in order that there be a complete record for judicial review of the dispositions, if such is sought. See Section 9(d) of the Act.

tive in the appropriate bargaining unit; this certification was in effect affirmed by the Board when it refused the Respondent's request for review thereof. It is therefore clear that the Respondent seeks to litigate in this unfair labor practice proceeding issues which have been finally decided by the Board in the representation proceeding. This the Respondent may not do before the Trial Examiner. It is established Board policy, in the absence of newly discovered or previously unavailable evidence, not to permit litigation in a complaint case of issues which were or could have been litigated in a prior related representation proceeding.[2]

This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and material issues are raised.[3] And that there are not such issues has been effectively decided by the Board.

The Trial Examiner has no authority to review the Board's final dispositions of the representation issues or to question its conclusions made on the existing record. The Respondent is free, in exceptions to this Decision, to request the Board to reconsider the determinations in the representation case, and, in the event of an unfavorable final

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2. *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146, 162; *Collins & Aikman Corp.*, 160 NLRB No. 135. And see Rules and Regulations, National Labor Relations Board, Series 8 as revised January 1, 1965, Sec. 102.67(f):

> Denial of a request for review [of a decision by a Regional Director in a representation case] shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

See also 102.69(c).

3. *O.K. Van and Storage, Inc.*, 127 NLRB 1537; *E-Z Davies Chevrolet*, 161 NLRB No. 121. And see *Air Control Window Products, Inc.*, 335 F.2d 245, 249: "If there is nothing to hear, then a hearing is a senseless and useless formality."

order by the Board the Respondent may request review of the determinations in an appropriate court of appeals. At this stage of the proceedings, however, absent newly discovered evidence, the Board's disposition of the representation matters is the law of the case and binding on the Trial Examiner. While the Respondent asserts that it has other evidence to adduce at a hearing, there is no claim that this evidence is newly discovered or previously unavailable.

The other procedural contention of the Respondent—that the Trial Examiner is without authority to grant a summary judgment—is equally unsustainable. The Board has approved the granting of summary judgment motions by Trial Examiners in prior cases. See *E-Z Davies Chevrolet*, 161 NLRB No. 121, and cases cited in footnote 5 of that decision. See also *Krieger-Ragsdale & Co., Inc.*, 159 NLRB No. 53.

The refusal to bargain being admitted, there are no issues litigable before a Trial Examiner, and therefore no matter requiring hearing. Accordingly, the General Counsel's motion for summary judgment has been granted, and I hereby make the following further:

Findings

I. The Business of the Respondent

(a) The Respondent is a Delaware corporation engaged in the repair, overhaul and modification of military aircraft at its Greenville, South Carolina, installation, on the former Donaldson Air Force base, pursuant to a contract with the U.S. Air Force.

(b) Respondent, during the past 12 months, which time is representative of all times material herein, received at its Greenville, South Carolina, installation, from points outside the State of South Carolina, raw materials valued

in excess of $50,000. During the same period, Respondent sold and shipped from its Greenville, South Carolina, installation, to points outside the State of South Carolina finished goods valued in excess of $50,000.

(c) During the past 12 months, which time is representative of all times material herein, in the course and conduct of its business operation, Respondent, at its Greenville, South Carolina, installation furnished services valued in excess of $50,000 which had a substantial impact on national defense.

(d) Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[4]

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.[5]

III. The Unfair Labor Practices

All production and maintenance employees, including leadmen, aircraft checkers, inventory audit clerks, timekeepers and firemen employed at the Employer's Greenville, South Carolina, operations excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

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4. The Respondent's answer denies the complaint allegation that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. However, it admits the specific facts stated in paragraphs I, (a), (b) and (c) above. These are sufficient to establish the findings in paragraph (d).

5. The Respondent's answer neither admits nor denies the allegation in the complaint that the Union is a labor organization within the meaning of the Act. That fact was established in the representation proceeding.

On December 10, 1965, an election was conducted in which the employees in the appropriate unit selected the union as their exclusive bargaining representative and on June 15, 1966, the Regional Director certified the Union as such representative.

On November 10, 1966, the Respondent refused and continues to refuse to meet with the Union for the purpose of conducting collective bargaining negotiations respecting the employees in the appropriate unit.

By thus refusing to meet with the Union, the Respondent has refused to bargain collectively in violation of Section 8(a)(5) of the Act and has interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Remedy

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that the Respondent refuses to bargain collectively with the Union. It will therefore be recommended that the Respondent, upon request, bargain collectively with the Union as the exclusive representative of the unit employees and, if an understanding is reached, embody such understanding in a signed agreement.

The Charging Party (the Union) asserts that the foregoing remedy, conventional in 8(a)(5) cases, is here inadequate. It urges a more "meaningful" remedy—one designed to "take the profit" out of deliberate procrastination in fulfilling the collective-bargaining obligation. Specifi-

cally the Charging Party requests an order directing the Respondent to make the employees whole for any monetary losses they may have suffered as a result of the Respondent's wrongful refusal to bargain. This proposition has been, and is now, before the Board and United States Courts of Appeals in a number of cases, as follows:

In three cases in which the issue was presented to the Board the Board declined to order such a remedy: *Preston Products Company, Inc.*, 158 NLRB No. 35, *Saks and Co.*, 160 NLRB No. 59, and *United Insurance Co.*, 162 NLRB No. 33. In the *Preston Products* case the matter was first raised before the Board, and the request was summarily denied as being "without merit." (*Id.*, footnote 1.) In the *Saks* and *United Insurance* cases the issue was raised before the Trial Examiners (Paul E. Weil and Harold X. Summers, respectively), who refused to recommend reimbursement orders, either on the ground that there was no precedent for it, or on the ground that such an order would be based on speculation as to the result of future bargaining. In those cases the Board adopted the Trial Examiner's decision without comment as to that issue. All three cases are presently pending before various United States Courts of Appeals: *Preston* and *Saks* before the Court of Appeals for the District of Columbia and *United Insurance* before the Court of Appeals for the Third Circuit.[6] As of this date there are no cases in which the Board has prescribed such a remedy.

In addition, the issue is presented in five cases pending before the Board at the present time: *Zinke's Foods*, Case 30-CA-372, TXD-662-66, Trial Examiner Josephine

6. I am informed that the Board has requested the Court of Appeals to remand the *Preston* case to it for further consideration. In the *United Insurance* case the company has filed a motion to transfer the proceedings to the Seventh Circuit.

Klein; *Kawneer Company, A Division of American Metal Climax, Inc.*, Case 9-CA-3335, TXD-330-66, Trial Examiner Sidney Asher; *Herman Wilson Lumber Company*, Case 26-CA-2536, TXD-757-66, Trial Examiner Thomas N. Kessel; *Ex-Cell-O Corp.*, Case 25-CA-2377, TXD-80-67, Trial Examiner Owsley Vose; *Monroe Auto Equipment Company, Hartwell Division*, Case 10-CA-6705, TXD-108-67, Trial Examiner Charles W. Schneider.

In *Zinke's Foods* and in *Ex-Cell-O Corp.*, Trial Examiners Klein and Vose took evidence respecting the remedial issue and, finding reimbursement orders warranted by the record, recommended the issuance of such orders by the Board. In the other cases presenting the issue to the Board and the courts, there is no indication that any evidential record was made providing a basis for such a remedy.[7]

In the instant case no evidential record was made or offered to support the propriety of the requested reimbursement order. On the basis of the record before me I find no adequate foundation for recommending such an order.

Though in some cases employees may properly and feasibly be ordered made whole for losses occasioned by a refusal to bargain (see, for example, *Fibreboard Paper Products Corp.*, 379 U.S. 203, 215, *et seq.* and cases cited by Trial Examiner Vose in *Ex-Cell-O Corp., supra*), on the record here the fact and amount of losses appears too speculative to warrant attempt at ascertainment. Absent experiential presumption or statistical or other evidence from which reasonable inference of possible loss may

7. In the *United Insurance* case the union offered in evidence a collective-bargaining contract which it had made with a predecessor employer as supporting the propriety of a reimbursement order, but apparently offered no other evidence. Trial Examiner Summers rejected the evidence on the ground that he regarded the union's contention as speculative (TXD footnote 65). The Board, without specific reference to that issue, affirmed the Trial Examiner's rulings.

flow, there is no basis in this record for a make-whole order. Without more than we have it cannot be said with sufficient certainty to warrant a reimbursement order that the Respondent and the Union would probably have bargained to a contract containing, without offsetting bargaining trades, monetary benefits above the present scale. What the Board said in the case of *Chemrock Corporation*, 151 NLRB 1074, 1082, in another connection seems applicable: ". . . it is speculative, and cannot be determined, what rate or rates of pay might have governed . . . had the Respondent fulfilled its objection to bargain. . . ." What the result might be upon a different record it is unnecessary to decide.

In order to insure that the employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, it will be recommended that the initial year of certification begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[8]

Upon the foregoing findings and conclusions and the entire record in the case, I recommend that the Board issue the following:

ORDER

A. For the purpose of determining the effective period of duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in food faith with the Union as the recognized bargaining representative in the appropriate unit.

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8. *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F. 2d 600 (1964, C.A. 5); *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F. 2d 57 (1965, C.A. 10).

B. LTV Electrosystems, Inc., Greenville, South Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, as the exclusive collective-bargaining representative in the following appropriate bargaining unit:

> All production and maintenance employees, including leadmen, aircraft checkers, inventory audit clerks, timekeepers and firemen employed at the Employer's Greenville, South Carolina, operations, excluding office clerical employees, professional employees, guards and supervisors as defined in the act

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as the exclusive collective-bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of work and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Greenville, South Carolina, installation, copies of the attached notice marked "Appendix."[9]

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9. In the event that this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

Copies of said notice, on forms to be furnished by the Regional Director for Region 11, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region Eleven, in writing within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.[10]

Dated at Washington, D. C. April 6, 1967.

/s/ Charles W. Schneider
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER
OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

We hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with UNITED AUTOMOBILE, AEROSPACE AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

10. In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region Eleven, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

AFL-CIO, as the exclusive bargaining representative of all the following employees:

All production and maintenance employees including leadmen, aircraft checkers, inventory audit clerks, timekeepers and firemen employed at the Employer's Greenville, South Carolina, operations, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL bargain collectively with the Union as the exclusive representative of these employees, and, if an understanding is reached, sign a contract with the Union.

LTV ELECTROSYSTEMS, INC.
(Employer)

Dated ..... By .....
(Representative (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1625 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina, 27101 (Tel. No. 723-2911).

Decision and Order

On April 6, 1967, Trial Examiner Charles W. Schneider issued his Decision in the above proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel, Charging Party and the Respondent filed exceptions and supporting briefs and the Respondent requests oral arguments.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and supporting briefs, and the entire record in this case, and hereby adopted the findings, conclusions, and recommendations of the Trial Examiner, except as modified herein.[2]

---

1. The Charging Party has filed exceptions to the Trial Examiner's rejection of its request for a monetary remedy to make the employees whole for losses they may have suffered as a result of the Respondent's unlawful refusal to bargain. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore deny the said request. However, in adopting the Trial Examiner's disposition of this matter, we do not pass on or adopt his rationale for rejecting the Charging Party's contention.

The Respondent's request for oral argument is denied as the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

2. The General Counsel excepts to the Trial Examiner's granting Respondent's Supplemental Motion to take Administrative Notice, dated March 1, 1967, of documents in possession of the Regional Director in connection with representation proceedings in Case No. 11-RC-2223. The General Counsel also excepts to the Trial Examiner's ordering that true copies of such docu-

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Ttrial Examiner, and hereby orders that the Respondent, LTV Electrosystems, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. July 3, 1967.

Gerald A. Brown, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member

(Seal) National Labor Relations Board

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ments which are in the exclusive possession of the Regional Director be forwarded by the Regional Director to the Board for inclusion in the official file of the representation proceeding. We find merit in the exception. The documents requested by Respondent in its Supplemental Motion are not part of the record in either the Representation Case 11-RC-2223, or the instant unfair labor practice proceeding within the meaning of Sections 102.68 and 102.45 (b) of the Rules and Regulations of the Board, nor are such documents encompassed within the requirements of Section 9(d) of the Act. Accordingly, we hereby overrule the Trial Examiner's granting such motion and the order included therein.

Opinion

Filed and Entered, January 18, 1968.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,560.

LTV Electrosystems, Inc.,
Petitioner,

versus

National Labor Relations Board,
Respondent.

ON PETITION FOR REVIEW AND ON CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIOAL LABOR RELATIONS BOARD.

Before BOREMAN, WINTER and BUTZNER, Circuit Judges.

(Argued January 10, 1968. Decided January 18, 1968.)

KNOX L. Haynsworth, Jr., (Thompson, Ogletree & Haynsworth on brief) for Petitioner, and Lawrence M. Joseph, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel and Corinna Lothar Metcalf, Attorney, National Labor Relations Board, on brief) for Respondent.

PER CURIAM:

LTV Electrosystems, Inc., urges that its "leadmen" were supervisors, and that the National Labor Relations Board erroneously did not afford the company a hearing on alleged election irregularities and in the unfair labor practice proceeding that resulted in an order to bargain.[1] For these reasons it challenges the Board's finding that it violated §§ 8(a)(5) and (1) of the act[2] by its refusal to bargain.

After extensive evidentiary hearings, the Board determined that the "leadmen" were not supervisors. We conclude that substantial evidence supports the Board's finding that these employees were properly included in the bargaining unit.

The Regional Director investigated the charges of election irregularities and found them to be without merit. The company's exceptions to his report show no substantial and material issues of fact that could be resolved only in a hearing. The company's request for review was denied by the Board. Under the circumstances, the Board was not required to hold an evidentiary hearing. *Macomb Pottery Co.* v. *NLRB*, 376 F.2d 450 (7th Cir. 1967). Nor was an evidentiary hearing required in the unfair labor practice proceeding. Cf. *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 161 (1941). Summary judgment was appropriate. *Neuhoff Brothers, Packers, Inc.* v. *NLRB*, 362 F.2d 611, 613 (5th Cir. 1966), *cert. den.*, 386 U.S. 956 (1967); *NLRB* v. *Puritan Sportswear Corp.*, ... F.2d ....., 66 LRRM 2492 (3rd Cir., Nov. 1, 1967).

The Board's order will be enforced.

Enforced.

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1. The decision and order are reported in LTV Electorsystems, Inc., 166 NLRB 81, 65 LRRM 1590 (1967).

2. 29 U.S.C. § 158(a)(5) and (1).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,560.

LTV Electrosystems, Inc.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

On Petition for Review of the Decision and Order of the National Labor Relations Board.

(Filed January 18, 1968)

THIS CAUSE came on to be heard upon the petition of LTV Electrosystems, Inc. (Greenville, South Carolina, facility), to review and set aside, annul and refuse enforcement of a certain order issued against it by the National Labor Relations Board on the 3rd day of July, 1967, in a proceeding before the said Board known amongst its records as Case No. 11-CA-3193; upon the answer of the National Labor Relations Board and cross-petition for enforcement, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals

for the Fourth Circuit, that the petition to review be, and the same is hereby, denied; that the order of the National Labor Relations Board be, and the same is hereby, enforced; and that the LTV Electrosystems, Inc. (Greenville, South Carolina, facility), abide by and perform the directions of the Board in said order contained.

John D. Butzner, Jr.
United States Circuit Judge

A true copy,
Teste:
/s/ Margaret L. Davis
Chief Deputy Clerk, U. S. Court of Appeals for the Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,560

LTV ELECTROSYSTEMS, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Order

(Filed March 12, 1968)

Upon consideration of the motion filed by LTV Electrosystems, Inc., to have relevant portions of the record filed;

It appearing to the court that on November 1, 1967 the parties filed a joint motion for leave to lodge documents with the court, including, as set forth in paragraph "s" of the motion, the statements of Roy Crawford, I. K. Keenan, David McNew and Bill Calvert dated May 26, 1966;

It further appearing that an order was entered granting the joint motion and directing that the documents be transmitted to this court and lodged; and

It further appearing that the above-mentioned statements were not included with the documents lodged as directed; accordingly,

IT IS ADJUDGED AND ORDERED that the National Labor Relations Board forthwith shall lodge, in quadruplicate, with the clerk of this court the statements of Roy Crawford, I. K. Keenan, David McNew and Bill Calvert dated May 26, 1966, and furnish copies to counsel for the petitioner.

/s/ John D. Butzner, Jr.
United States Circuiit Judge

A true copy,
Teste:
/s/ Margaret L. Davis
Chief Deputy Clerk, U. S. Court of Appeals for the Fourth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,560

LTV Electrosystems, Inc.,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Order

(Filed March 27, 1968)

Upon consideration of (a) the motion of the National Labor Relations Board filed March 7, 1968, requesting that the statements of I. K. Keenan, David McNew and Bill Calvert be examined by the Court *in camera*, and the response of the petitioner, LTV Electrosystems, Inc., and (b) the motion of the National Labor Relations Board, filed March 19, 1968, requesting reconsideration of that portion of the order of this Court entered March 12, 1968, which directed it to furnish copies of said statements to counsel for petitioner,

IT IS ADJUDGED AND ORDERED:

1. Said motions are denied.

2. The National Labor Relations Board is directed forthwith to send copies of the statements to counsel

for the petitioner and thereafter to notify this Court of its compliance with this order.

/s/ Herbert S. Boreman
United States Circuit Judge
/s/ Harrison L. Winter
United States Circuit Judge
/s/ John D. Butzner, Jr.
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,560

LTV ELECTROSYSTEMS, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Order

(Filed April 18, 1968)

Upon consideration of the petition for rehearing, or in the alternative for rehearing en banc, filed by LTV Electrosystems, Inc.; the statements of I. K. Keenan, David McNew, and Bill Calvert filed to supplement the record by the National Labor Relations Board at the direction of the court upon motion of the petitioner; and the supplementary authorities furnished by the petitioner; and

It appearing that these papers add nothing of substance requiring modification of the court's disposition of this appeal,

It is ADJUDGED and ORDERED that the petition is denied.

/s/ Herbert S. Boreman
United States Circuit Judge

/s/ Harrison L. Winter
United States Circuit Judge

/s/ John D. Butzner, Jr.
United States Circuit Judge

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended [29 U.S.C. §151 *et seq.*], are as follows:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * *

"Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have

the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person

to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * *

"Sec. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the

filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

LIBRARY
SUPREME COURT, U. S.

No. 301

FILED
AUG 14 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

LTV ELECTROSYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COMEN,
Assistant General Counsel,
LAWRENCE M. JOSEPH,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1968

LTV ELECTROSYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A35–A36) is reported at 388 F. 2d 683. The decisions and orders of the Board are set forth at Pet. App. A1–A34.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1968, and a petition for rehearing or for rehearing *en banc* was denied on April 18, 1968 (Pet. App. A37–A38, A41–A42). The petition for a writ of certiorari was filed on July 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

316-197—68

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. B1.

QUESTIONS PRESENTED

1. Whether the Board properly overruled the Company's objections to a representation election and certified the Union as bargaining representative.

2. Whether an employer is entitled to a formal hearing on objections to a representation election where such objections fail to raise any substantial and material issues of fact.

STATEMENT

Petitioner's Greenville, South Carolina, plant was established early in 1965, pursuant to a contract with the United States Air Force for the repair and overhaul of military aircraft. On July 1, 1965, the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the "Union"), filed a petition with the Board requesting certification as the bargaining agent for a unit of the Company's employees. On October 26, the Regional Director directed that an election be held (J.A. 208–217). In the election conducted on December 10, the Union prevailed, by a vote of 210 to 115, with 21 ballots challenged (J.A. 218h; Pet. App. A1).[1]

[1] Previously, on November 15, the Company had requested the Board to review the Regional Director's decision directing an election. The Board granted this request insofar as it raised issues pertaining to the supervisory status of leadmen. In substance, the Company claimed that the leadmen were supervisors

The Company filed timely objections to the election, alleging, *inter alia*, that "by and through its organizers and agents and/or persons acting on its behalf," the Union had engaged in "illegal and unlawful conduct" by electioneering at the polls (J.A. 219). In regard to this objection, the Regional Director's investigation [2] disclosed that former employee Wayne England,[3] while waiting in line to vote, had made several remarks to other employees standing around him, urging them to vote for the Union and referring to the benefits which he believed would be forthcoming if the Union won. The Regional Director, finding no evidence that England was an agent of the Union, or that he had been acting in its behalf or at its request in making his remarks, concluded that such remarks "constitute no more than typical conversation between voters in line expressing their own feelings as to the issue at hand" (J.A. 222; Pet.

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within the meaning of Section 2(11) of the Act, and had spearheaded the Union's campaign. Extensive hearings on this issue were held, and the Board, on April 15, 1966, issued a decision (J.A. 217–218g) holding that the leadmen were employees, not supervisors, and ordering that their ballots, which had been impounded pending decision of the issue, be counted. The court of appeals concluded that "substantial evidence supports the Board's finding that these employees were properly included in the bargaining unit" (Pet. App. A36).

[2] The Company did not request a hearing. In its objections, filed April 29, 1966, it asked merely "that the Regional Director inquire into, investigate, and sustain these objections * * *" (Employer's Objections to Election of December 10, 1965, p. 3).

[3] England had been discharged, allegedly in an illegal manner, less than a month before the election, and was permitted to vote a challenged ballot (see Pet. App. A5).

App. A6). Accordingly, he overruled the objection and certified the Union (J.A. 227; Pet. App. A6, A10). Upon the Company's motion for reconsideration, the Regional Director adhered to his original conclusion, adding that, under the circumstances presented, England's conduct at the polls could not have affected the outcome of the election (Pet. App. A17). The Company's request to the Board for review was denied on the ground that it raised no substantial issues warranting review (Pet. App. A20).

The Company then refused the Union's request to bargain, the Union filed unfair labor practice charges, and a complaint was issued by the Board's General Counsel. Pursuant to the General Counsel's motion for summary judgment, the Trial Examiner issued an order to show cause why summary judgment should not be granted. After consideration of briefs and memoranda filed by the parties, the Examiner granted the motion for summary judgment. He concluded that, since the Company offered no newly discovered or previously unavailable evidence with respect to the issues already disposed of in the representation proceeding, an evidentiary hearing was unnecessary (J.A. 228–242; Pet. App. A24), and held that the Company had violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union (J.A. 235–236; Pet. App. A26). The Board affirmed the Examiner's conclusion and ordered the Company to bargain, upon request, with the Union (J.A. 243–244; Pet. App. A33–A34, A30). Upon review, the court of appeals enforced the Board's order. It held, *inter alia*, that the Company's exceptions to the Regional

Director's report "show no substantial and material issues of fact that could be resolved only in a hearing," and that therefore "the Board was not required to hold an evidentiary hearing" (Pet. App. A36).

ARGUMENT

The decision of the court of appeals turns solely upon the particular facts of this case, and is not in conflict with the decision of any other circuit. Accordingly, there is no occasion for further review.

1. Petitioner's contention (Pet. 8) that the Board refused to apply its own rule against electioneering at the polls is based on an incorrect factual premise. Contrary to the Company's view, the Regional Director, whose findings were accepted by the Board and the court of appeals, did not determine that England was engaged in "electioneering", but rather that his remarks constituted no more than "typical conversation between voters in line expressing their own feelings as to the issues at hand" (Pet. App. A6). Accordingly, the only question presented with respect to England's remarks is whether the Regional Director could reasonably conclude that, in the circumstances here, the remarks did not affect the outcome of the election. Such an issue does not warrant review by this Court.[4]

[4] In any event, the Regional Director's conclusions regarding England's remarks was clearly reasonable. He found that England was not an agent of the Union, but was merely voicing his views as an employee-voter on the election issues, a commonplace occurrence even in voting lines, in view of the importance of such issues to employees (Pet. App. A16). Contrary to the Company's contention (Pet. 9), the Regional Di-

The cases relied upon by the Company (Pet. 8–12) are distinguishable on their facts. Thus, in *Claussen Baking Co.*, 134 NLRB 111, a non-supervisory leadman, flanked by the plant operations manager and the company's sales supervisor, stood near the polls and urged employees, including several who were newly hired, to vote against the Union.[5] In *Star Expansion Industries Corp.*, 170 NLRB No. 47, undisputed evidence established that the employee was an agent of the union and had acted in its behalf in electioneering at the polls and in distributing campaign literature. Moreover, this employee had remained in close proximity to the polls during a substantial portion of the voting period, notwithstanding the Board agent's instructions, on three separate occasions, to leave the polling area. Finally, in *Milchem, Inc.*, 170 NLRB No. 46, and *Kilgore Mfg. Co.*, 45 NLRB 468, there was extensive electioneering at the polls by individuals who were clearly officials of the unions.[6]

2. Petitioner's contention (Pet. 12–13) that it was entitled to an evidentiary hearing on its objections is

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rector did not rest solely on the ground that England was not an agent of the Union, but went on to find that the nature of his actions were not such as would affect employee freedom of choice (Pet. App. A6, A17).

[5] In setting aside the election, the Board noted that, since the Union had lost by only one vote, the proscribed conduct could have affected the election results even if only one vote had been swayed by it (134 NLRB at 112). In contrast, in the instant case the Union won by 95 votes (J.A. 218h; Pet. App. A1).

[6] Petitioner's reliance on *Peerless Plywood Co.*, 107 NLRB 427 (Pet. 8, 11), is wholly misplaced. Since the gist of the Board's decision there was to create a limitation on captive audience speeches by an *employer* within 24 hours of an election, that case is totally inapposite.

without substance. The Regional Director found, and petitioner does not contest his finding, that there was no dispute as to the facts concerning England's actions—that the only issue related to the legal significance, if any, of his remarks. It is well established that, where no factual questions are presented, "a hearing is a senseless and useless formality." *National Labor Relations Board* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (C.A. 5).[7] Contrary to petitioner's assertion (Pet. 13), *National Labor Relations Board* v. *K.V.P. Sutherland Paper Co.*, 356 F. 2d 671 (C.A. 6), is not contrary. There, unlike here, it was found that the challenge to an election raised material issues of fact which required a hearing (*id.* at 674).[8]

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[7] In accord with this view of the validity of the Board's summary judgment practice are: *Macomb Pottery Co.* v. *National Labor Relations Board*, 376 F. 2d 450 (C.A. 7); *Neuhoff Bros. Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611 (C.A. 5), certiorari denied, 386 U.S. 956; *National Labor Relations Board* v. *Bata Shoe Company, Inc.*, 377 F. 2d 821, 826 (C.A. 4), certiorari denied, 389 U.S. 917; *National Labor Relations Board* v. *Puritan Sportswear Corp.*, 385 F. 2d 142 (C.A. 3); *National Labor Relations Board* v. *Cumberland Farms, Inc.*, 370 F. 2d 54, 55 (C.A. 1); *National Labor Relations Board* v. *Tennessee Packers, Inc.*, 379 F. 2d 172 (C.A. 6), certiorari denied, 389 U.S. 958. Moreover, the Board's Rules and Regulations explicitly provide for a hearing on objections to an election where they raise "substantial and material factual issues" (29 C.F.R. 102.69(c)).

[8] In addition, as the Trial Examiner noted, "It is established Board policy, in the absence of newly discovered or previously unavailable evidence, not to permit litigation in a complaint case of issues which were or could have been litigated in a prior related representation proceeding" (Pet. App. A23). That policy, the Examiner pointed out, "is applicable even though no

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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formal hearing on objections has been provided by the Board," since "[s]uch a hearing is not a matter of right unless substantial and material issues are raised" (*ibid.*). Cf. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 161–162.

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